No. 9420

IN THE /3

United States Circuit Court of Appeals

For the Ninth Circuit

HAROLD L. MONTGOMERY,
Appellant,

vs.

JAMES A. JOHNSTON, Warden, U. S. Penitentiary, Alcatraz, California,
Appellee.

BRIEF FOR APPELLEE.

FRANK J. HENNESSY,
United States Attorney,
R. B. McMILLAN,
Assistant United States Attorney,
A. J. ZIRPOLI,
Assistant United States Attorney,
Post Office Building, San Francisco,
Attorneys for Appellee.

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BRIEF FOR APPELLEE.

JURISDICTIONAL STATEMENT.

This is an appeal from an order of the United States District Court for the Northern District of California denying appellant's petition for a writ of habeas corpus. (T. 33.) The District Court had jurisdiction of the habeas corpus proceedings under Title 28 U. S. C. A., Sections 451, 452 and 453.

Jurisdiction to review the District Court's order denying the petition is conferred upon this Court by Title 28 U. S. C. A., Sections 463 and 225.

STATEMENT OF THE CASE.

On April 15, 1930 the appellant pleaded guilty to two counts of an indictment charging violations of

Section 320 of Title 18 U. S. C. A. (Criminal Code, Section 197) for which he received sentences of three years and six months imprisonment on the first count and 25 years imprisonment on the second count, the sentences to run consecutively. (Tr. 18 and 20.) Later in a habeas corpus hearing at Atlanta, Georgia, before the United States District Court for the Northern District of Georgia the sentence of 3 years and 6 months imprisonment on the first count was declared void, leaving the sentence on the second count of 25 years imprisonment effective as of April 25, 1930, to be served. (Tr. 4 and 23.)

Appellant again petitioned for a writ of habeas corpus before the Court below and contended that the second count of the indictment did not allege an offense for which on conviction the Court could impose a sentence of imprisonment for 25 years. (Tr. 3-11 inclusive.)

The language of the second count of the indictment and the statute involved are hereinafter set forth in full in the argument.

The Court below denied appellant's petition and from the order of denial appellant now appeals to this Honorable Court.

QUESTION.

Does the second count of the indictment charge an offense for which appellant on conviction could be lawfully sentenced to imprisonment for twenty-five years?

ARGUMENT.

We respectfully submit that the second count of the indictment charges an offense punishable by imprisonment for 25 years under the provisions of Section 320 of Title 18, U. S. C. A., which at the time of appellant's conviction read as follows:

> "320. (Criminal Code, Section 197.) Assaulting mail custodian and robbing mail; wounding custodian. Whoever shall assault any person having lawful charge, control, or custody of any mail matter, with intent to rob, steal, or purloin such mail matter or any part thereof, or shall rob any such person of such mail or any part thereof, shall, for a first offense, be imprisoned not more than ten years; and if in effecting or attempting to effect such robbery, he shall wound the person having custody of the mail, or put his life in jeopardy by the use of a dangerous weapon, or for a subsequent offense, shall be imprisoned twenty-five years. (R. S. Sections 5472, 5473; Mar. 4, 1909, c. 321, Sec. 197, 35 Stat. 1126.)"[1]

The second count of the indictment reads as follows:

> "That on or about the 14th day of December, 1929, in the City of Rensselaer, in the Northern

1. Section 320 Title 18 U. S. C. A. was amended August 26, 1935, to read as follows:

"Section 320. (Criminal Code, Section 197.) Assaulting mail custodian and robbing mail; wounding custodian.

"Whoever shall assault any person having lawful charge, control, or custody of any mail matter or of any money or other property of the United States, with intent to rob, steal, or purloin such mail matter, money or other property of the United States, or any part thereof, or shall rob any such person of such mail matter, or of any money or other property of the United States, or any part thereof, shall, for the first offense, be imprisoned not more than ten years; and if in effecting or attempting to effect such robbery he shall wound the person having custody of such mail, money, or other property of the United States, or put his life in jeopardy by the use of a dangerous weapon, or for a subsequent offense, shall be imprisoned twenty-five years. (As amended Aug. 26, 1935. c. 694, 49 Stat. 867.)"

District of New York, and within the jurisdiction of this Court, one JOHN J. JONES, one HAROLD L. MONTGOMERY and one WILLIAM J. SIMMONS, whose true, full and correct names are to the Grand Jurors unknown, except as herein set forth, did then and there unlawfully, wilfully and feloniously assault one IRA M. DERRICK, he the said IRA M. DERRICK being then and there a person having possession, charge, control and custody of United States mail matter, with intent to rob, steal and purloin such mail matter, and to take and carry away from the possession of the said IRA M. DERRICK said United States mail matter, or part thereof, then in the lawful charge, control and custody of him, the said IRA M. DERRICK, and in attempting to effect such robbery as aforesaid, did put in jeopardy the life of said IRA M. DERRICK, who being then and there a person having custody of the United States mail matter by the use of a dangerous weapon to wit: an Iver-Johnson 32-caliber hammerless revolver, contrary to the form of the statute in such cases made and provided, particularly Sec. 197 CC and against the peace and dignity of the United States of America." (T. 16.)

Certainly this second count of the indictment recites an offense within the language of the latter portion of Section 320, Title 18 U. S. C. A. quoted above, for it in effect charges that appellant *attempted to commit the crime of robbery,* and that in the *course of such attempt* put the life of a person having custody of mail matter in jeopardy by the use of a dangerous weapon.

Price v. U. S., 218 Fed. 149.

Appellant seems to be of the opinion that the *robbery must be effected* before an offense is committed within the meaning of the latter portion of said Section 320. Although *Norton v. Zerbst,* 83 F. (2d) 677, may seem to support this conclusion on the part of defendant, that case is really not applicable because a completed robbery was involved and no effort was made by the Court to interpret the words of the statute which read *"in * * * attempting to effect such robbery"*. In the case before this Honorable Court while the indictment does not specifically and with true exactness allege that the defendant attempted to rob mail matter from the possession of a person having custody, it does in effect so allege, for an *assault with intent to commit a crime necessarily embraces an attempt to commit the crime.*

People v. Akens, 143 P. 795, 796, 25 Cal. App. 373, 374.

An assault in not a mere act of preparation, but is the beginning of the attempt.

Snetzer v. State, 279 S. W. 9, 11, 170 Ark. 175.

It is true that an attempt to rob is not necessarily an assault and that the terms are not synonymous as the Court ruled in *Aderhold v. Schiltz,* 73 F. (2d) 381, but here we are not endeavoring to say that an attempt to rob is an assault but we do say that an assault with intent to rob constitutes an attempt to rob.

Thus in the case of *People v. Rizzo,* 223 N. Y. S. 200, 201, 221 App. Div. 353, we had an attempt to commit robbery without the element of assault. There the

defendants, who after entering into an agreement to rob a certain person and obtain weapons, proceeded to the place where they expected to find their intended victims and failed to carry out the robbery only because they were arrested before they located him, were held guilty of an attempt to commit robbery. On the other hand in the case of *People v. Akens,* supra, the Court in saying that "attempt" does not necessarily include an "assault" went on to say, however, that "an assault with intent to commit a crime necessarily embraces an attempt". So that in this case where we have an assault of one having custody of mail matter with intent to rob, steal, and purloin and take away such mail matter, we have an attempt to rob such mail matter and since the indictment further charges that in *attempting* to effect such robbery as aforesaid, the defendant put in jeopardy the life of the person having custody of United States mail matter by the use of a dangerous weapon, we have an offense recited within the meaning of the latter portion of Section 320.

Therefore while the indictment may not have been phrased as clearly as it might have been, nevertheless it sufficiently alleges an offense punishable by 25 years imprisonment to make the indictment good against collateral attack by habeas corpus.

Van Gorden v. Johnson, 87 F. (2d) 654, 656;
Stewart v. Johnson, 97 F. (2d) 548.

CONCLUSION.

The second count of the indictment alleges an offense within the provisions of Section 320 of Title 18 U. S. C. A., violation of which is punishable by imprisonment for 25 years, consequently no error was committed by the Court below when it denied appellant's petition for writ of habeas corpus.

It is respectfully submitted that the order of the Court below should be affirmed.

Dated, San Francisco,
January 24, 1940.

FRANK J. HENNESSY,
United States Attorney,
R. B. MCMILLAN,
Assistant United States Attorney.
A. J. ZIRPOLI,
Assistant United States Attorney,
Attorneys for Appellee.